

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMAN LESTER DIXON,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 217840

St. Clair Circuit Court

LC No. 98-001068-FH

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of felonious assault, MCL 750.82(1); MSA 28.277(1), and one count each of possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to two to six years' imprisonment for the felonious assault convictions, and to 2 to 7½ years' imprisonment for the possession of a firearm by a convicted felon conviction, to run concurrently. Defendant also received a mandatory consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The prosecution alleged that defendant had an argument with Bonnie Swift-Summers and Eugene Swift, during which defendant pointed a shotgun at both and threatened to shoot them. Defendant claimed that he did not point the gun at anyone.

I

On appeal, defendant first claims that his waiver of his right to counsel was invalid. We disagree. We review constitutional issues, which are issues of law, de novo. *People v Echavarria*, 233 Mich App 356, 358; 592 NW2d 737 (1999). For a proper waiver of the right to counsel, defendant must make an unequivocal request to represent himself; the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily; the trial court must determine that the defendant will not unduly disrupt the court while acting as his own counsel; and the trial court must

satisfy the requirements of MCR 6.005(D).¹ *People v Adkins (After Remand)*, 452 Mich 702, 721-722; 551 NW2d 108 (1996).

Notwithstanding, strict compliance with the waiver requirements is unnecessary; instead, courts need only substantially comply with the waiver requirements. *Id.* at 706. The substantial compliance standard protects a defendant's vital constitutional rights while avoiding unjustified manipulation of the criminal justice system. *Id.* at 727. In addition, it ensures that defendants are protected, but "with far less of the problems associated with requiring courts to engage in a word-for-word litany approach." *Id.*

The record in this case persuades us that the trial court substantially complied with the four waiver of counsel requirements. Regarding the first requirement, defendant expressly requested to represent himself at the preliminary examination, involved himself in conducting the preliminary examination, rejected the assistance of available court-appointed attorneys, necessitating adjournments of his trial, and ultimately decided to proceed with only "advisory" counsel. Concerning the second requirement, the record demonstrates that defendant acknowledged that he faced imprisonment if convicted, gave an elaborate opening statement at trial, and interposed motions and objections throughout the proceedings. Thus, considering defendant's general competence and his conduct in orchestrating repeated procedural claims and delays of nearly six months, and mindful that the trial judge was in the best position to determine whether defendant waived his rights, we conclude that defendant appreciated the consequences of self-representation and elected to represent himself "with eyes open." *Id.* at 722-724, 729-730; *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994); *People v Ahumada*, 222 Mich App 612, 614-615; 564 NW2d 188 (1997).

Moreover, in light of the extensive pretrial proceedings in this case and the trial court's recognition that defendant was well-versed in courtroom procedures, the court adequately assessed the requirement concerning court disruption. There was also substantial compliance with the fourth requirement, despite the fact that the trial court did not expressly mention the court rule, given evidence that defendant knew the ramifications of self-representation, was urged not to

¹ MCR 6.005(D) provides:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

represent himself in the instant trial, was aware of the possible punishment if convicted, and had repeated opportunities to consult with attorneys. *Adkins*, *supra* at 731. Therefore, considering the non-formalistic nature of the substantial compliance test articulated in *Adkins*, a fair reading of the record as a whole establishes that it is inconceivable that defendant did not know what he was doing in waiving his right to counsel, *People v Mack*, 190 Mich App 7, 16; 475 NW2d 830 (1991), and that defendant elected to represent himself with eyes open. *Ahumada*, *supra* at 614. Defendant has failed to show that his waiver of the right to counsel was invalid.

II

Defendant's next assignment of error is that the waiver of his right to a jury trial was invalid. We find no circumstances warranting review of this forfeited claim. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

A defendant's waiver of the constitutional right to trial by jury must be voluntary. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). MCR 6.402(B) provides:

Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Because of the successive withdrawals of defense counsel in this case, the record is disjointed concerning the waiver of defendant's jury trial right, after counsel informed the court that defendant was demanding a bench trial. Nevertheless, the record sufficiently indicates that defendant voluntarily waived his right to a jury trial, given the repeated references to defendant's demand for a bench trial, including specific acknowledgments by defendant himself, and the prosecutor's agreement to a bench trial at a pre-trial hearing. See *People v Leonard*, 224 Mich App 569, 595-596; 569 NW2d 663 (1997). Even if the trial court's procedural handling of defendant's waiver was marked by error, defendant has failed to show the error was prejudicial. See *Carines*, *supra* at 763-764.

III

Next, defendant argues that the trial judge should have recused himself in the instant case because he could not be impartial. We disagree.

Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B)(1); *People v Coones*, 216 Mich App 721, 726-727; 550 NW2d 600 (1996). Generally, an actual showing of prejudice is required before a trial judge will be disqualified. *Id.* at 726. A trial

court's decision denying a party's motion for disqualification will be reversed only where the court abused its discretion. *People v Bero*, 168 Mich App 545, 549; 425 NW2d 138 (1988). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the trial court's ruling. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998).

We have reviewed defendant's arguments and the lower court record and conclude that the trial judge properly denied defendant's motion for disqualification because there was no actual showing of prejudice against defendant. The trial court's isolated statements indicate no bias when reviewed in the context of the entire record. *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1999). The record indicates that the court's comment during trial, that defendant had "committed four crimes," was, as defendant suggests, merely a misstatement in the context of addressing the relevancy of defendant's line of questioning, which was unrelated to the charged crimes. Further, to the extent that defendant argues that the trial court's actions in duct-taping his mouth during sentencing constituted impermissible bias, we disagree. While an extreme measure, the placement of duct tape over defendant's mouth at sentencing was an action to prevent defendant's disorderly conduct and maintain a quiet and peaceable court proceeding in light of defendant's persistent refusal to comply with the trial court's requests. *People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994). In short, defendant's mere suspicion of bias fails to overcome the presumption of judicial impartiality. *Coones, supra* at 727.

IV

Defendant's final claim is that the trial court erred in failing to quash the information. Again, we disagree. This Court reviews de novo the trial court's decision to quash the information on legal grounds. *People v Motor City Hosp & Surgical Supply, Inc*, 227 Mich App 209, 212; 575 NW2d 95 (1997).

Repeated prosecutions of a defendant for the same offense may violate the defendant's right to due process. *People v Turmon*, 128 Mich App 417, 421; 340 NW2d 110 (1983). Among the factors to be considered in determining whether a due process violation has occurred are: (1) the reinstitution of charges without additional, non-cumulative evidence not introduced at the first preliminary examination, (2) the reinstitution of charges to harass, and (3) judge-shopping to obtain a favorable ruling. *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984).

Defendant contends that the information in this case should have been quashed because it constituted harassment. In support, defendant cites *Turmon, supra*. However, defendant's reliance on *Turmon* is misplaced, for two reasons. First, unlike in *Turmon, supra* at 422, the circuit court in the instant case did not quash the first information because of an evidentiary defect in the information, but rather quashed the information on the basis of procedural defects. The mere refile of a case after an initial complaint is dismissed without prejudice for procedural reasons, without more, is not a violation of due process. *People v Dilling*, 222 Mich App 44, 49; 564 NW2d 56 (1997); *Vargo, supra* at 578. Second, unlike in *Turmon, supra* at 422, there was

no evidence in the present case that the prosecution engaged in improper judge shopping. The court did not err in denying defendant's motion to quash the information.

Affirmed.

/s/ Roman S. Gibbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell